



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Denial of a Variance for Three

Joint Driveways to the City of Kaukauna

Case No.: TR-00-0026

ORDER ON MOTION TO DISMISS

On June 8, 2000, the Division of Hearings and Appeals received a request for hearing from the City of Kaukauna ("City") to review the Department of Transportation's ("Department") decision to deny the City's request for a variance for three joint driveways from property owned by the City onto state trunk highway number 96.

The Department filed a motion to dismiss on July 19, 2000, and the City filed its response to the motion on July 26, 2000. The motion is granted.

Background

The City owns a parcel of approximately 15 acres that abuts state trunk highway number 96 ("STH 96"). The City wishes to subdivide this parcel into lots smaller than 1.5 acres for development of residential property. The proposed subdivision would require the placement of three private driveways that would connect directly onto STH 96.

By letter dated October 28, 1999, the City requested that the Department grant a variance under Wis. Adm. Code § Trans 233.11, "Variances", to the "basic requirement" of Wis. Adm. Code Chapter Trans 233, "Division of Land Abutting a State Trunk Highway or Connecting Highway", that a "land division ... be so laid out that its individual lots or parcels do not require direct vehicular access to a state trunk highway". Wis. Adm. Code § Trans 233.02(2). The City requested that the Department "not object" to its proposed plat that would include the driveways onto STH 96.

By letter dated December 12, 1999, an official of the Department's Transportation District 3 denied the request for the variance and informed the City that it had the right to appeal the determination to the Department's Director of the Bureau of Highway Development. By letter dated December 22, 1999, the City pursued such an appeal.

By letter dated May 10, 2000, the Department sent the City a "Record of Decision Regarding a Request for a Variance to Trans 233 Requirements", in which the Director of the Bureau of Highway Development sustained District 3's denial of a variance. The Department included the following notice in its letter:

You have the right to a hearing before the Division of Hearings & Appeals.... You have thirty days from the date of this letter to request a hearing.

On June 8, 2000, the City sent a letter to the Division of Hearings and Appeals requesting a hearing on the denial of a variance.

The Department has now filed a motion to dismiss the appeal for "lack of subject matter jurisdiction" based on Wis. Stat. § 86.073(3), which provides for a hearing from the Department's denial of a request for a permit to construct an entrance from a state trunk highway from abutting premises. The Department contends that section 86.073(3) does not apply because the City has not applied for such a permit to construct the driveways but instead has sought to obtain the Department's approval of a proposed plat that reflected the proposed driveways.

In its response to the motion, the City has not based its claim to a hearing upon § 86.073(3), but rather argues that a hearing should be allowed under Wis. Stat. § 227.51(1), which pertains to contested case hearings from the denial of "licenses". The City contends that the denial of a variance amounts to the denial of a "license", as defined in Wis. Stat. § 227.01(5), so that the right to a contested case hearing arises under § 227.51(1).

The Department's motion is granted, so the City's request for a hearing is dismissed.

Statutory and Regulatory Framework

The Department has the authority to prescribe minimum standards for division of land abutting state trunk highways by virtue of Wis. Stat. Chapter 236, "Platting Lands and Recording and Vacating Plats". Section 236.13(1)(e), Stats., provides that a subdivision plat may be approved for recording only if it is in "compliance with ... rules of the department of transportation relating to the provision for the safety of entrance and departure from the abutting state trunk highway".

Wis. Stat. § 236.12(2)(a) requires a land divider to submit a plat to the Department "so that [the Department] may determine whether it has any objection to the plat on the basis of its rules as provided in s. 236.13". Upon formal receipt of a plat, the Department has 20 days in which either to express its objection or to certify that it has no objection. Wis. Stat. § 236.13(3). If the Department fails to act within the 20-day period, then the Department is deemed to have no objection to the plat. *Id.* A person may appeal the Department's objection to a plat by a certiorari action filed in circuit court. Wis. Stat. § 236.13(5) and § 62.23(7)(e)10.

Chapter Trans 233, Wis. Adm. Code, is the Departments' implementing regulation for its statutory plat review responsibilities. Section Trans 233.02(2) establishes as a "basic requirement" of subdivision plats that a "land division shall be so laid out that its individual lots or parcels do not require direct vehicular access to a state trunk highway". Section Trans 233.05 addresses direct access to state trunk highways in more detail. It provides in pertinent part:

Trans 233.05 Direct access to state trunk highway or connecting highway.

(1) No land divider may divide land in such a manner that a private road or driveway connects with a state trunk highway ... unless the land divider has received a variance for that purpose approved by the department under s. Trans 233.11....

* * * *

(3) No person may connect a highway or a private road or driveway with a state trunk highway, connecting highway, or with a service road lying partially within the right-of-way of a state trunk highway or connecting highway, without first obtaining a permit under s. 86.07, Stats. The department may not issue a permit authorizing the connection of a highway with a state trunk highway or connecting highway to any person other than a municipality or county. The department may not issue any permit under s. 86.07, Stats., prior to favorable department review of the preliminary or final land division map or, for a subdivision plat, prior to the department's certification of no objection.

Section Trans 233.11(2) sets forth the circumstances in which the Department may grant a variance to the requirements of Chapter Trans 233:

The department may not authorize variances from this chapter except in appropriate cases in which the literal application of this chapter would result in practical difficulty or unnecessary hardship, or would defeat an orderly overall development plan of a local unit of government. A variance may not be contrary to the public interest and shall be in harmony with the general purposes and intent of ch. 236, Stats., and of this chapter....

Wis. Stat. § 86.07(2) requires a person to obtain a permit from the Department before altering or disturbing any highway. Wis. Stat § 86.073 specifies the method of appealing the denial of a request for a permit under § 86.07(2) "to construct an entrance to a state trunk highway from abutting premises". Section 86.073 provides as follows:

86.073 Review of denial of permit.

(1) If a district office of the department denies a request for a permit under s. 86.07 (2) to construct an entrance to a state trunk highway from abutting premises or revokes a permit issued under s. 86.07 (2), the department shall, upon written request by the applicant within 30 days after the denial, review the decision of the district office.

(2) After review, the department may reverse, confirm or modify the decision of the district office.

(3) If the department confirms or modifies the decision of the district office, the department shall notify the applicant of the action and the grounds for the action and shall also notify the applicant of a right to a

hearing before the division of hearings and appeals. Upon written request by the applicant within 30 days after the notice is mailed to the applicant, the division of hearings and appeals shall schedule a hearing to be held within 60 days after receipt of the request.

Wis. Adm. Code Chapter Trans 231 sets forth the standards for issuance of permits under Wis. Stat. § 86.07(2) "for placing [or] constructing private driveways ... for movement of traffic between state trunk highways and abutting property". Section Trans 231.01(2). Section Trans 231.01(9) specifies that no permit "may be issued ... for construction of ... a private ... driveway that connects with a state trunk highway ... unless ... the department determines that the land division meets the requirements of ch. Trans. 233."

Discussion

Section 86.073(1), Stats.

"[A]dministrative agencies are tribunals of limited jurisdiction and dependent upon statutory grants of authority". *State Public Intervenor v. DNR*, 184 Wis.2d 407, 421, 515 N.W.2d 305 (Ct. App. 1993). The Department is correct in its assertion that Wis. Stat. § 86.073(1) does not confer upon the City a right to a hearing. Section 86.073(3) allows a hearing before the Division of Hearings and Appeals only from the denial of a request for a permit to construct an entrance to a state trunk highway. The City has not sought, nor has the Department denied, a request for such a permit. There being no denial of such a permit, there is no right to a hearing under § 86.073(3), Stats.

The denial of a variance under section Trans 233.11 is not the functional equivalent of the denial of a permit under § 86.07(2), Stats. The regulatory scheme contemplates a land divider first obtaining approval of a plat under Chapter Trans 233, and then obtaining a permit under Wis. Stat. § 86.07(2) for construction of a private driveway according to the approved plat. Under section Trans 233.05(1), a variance is a condition to plat approval. Under sections Trans 233.05(3) and Trans 231.01(9), plat approval is a condition to issuance of a permit to construct issued under § 86.07(2), Stats., and Chapter Trans 231. Thus, the Department's approval of a plat allowing for a private driveway, and its subsequent action on a permit for the actual construction of such a platted driveway, constitute separate stages of a process. Plat approval is the planning stage of the process. Issuance of a permit for construction is the implementation stage of the process. Appeal of disapproval of a plat (and thus denial of variance) is available only by certiorari under Wis. Stat. § 236.13(5), as discussed below. Appeal of denial of a permit to construct a driveway according to an approved plat is available under Wis. Stat. § 86.073.

Section 227.51(1), Stats.

The City does not have the right to a contested case hearing under Wis. Stat. § 227.51(1). Section 227.51(1) provides as follows:

When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

"License" is defined in Wis. Stat. § 227.01(5) as follows:

"License" includes all or any part of an agency permit, certificate, approval, registration, charter or similar form of permission required by law

Even if a variance under Section Trans 233.11 is a "license", the City is not entitled to a hearing on the matter under § 227.51(1) for at least two reasons.

First, § 227.51(1), by its terms, allows for a contested case hearing from the denial of a license only when the denial "is required to be preceded by notice and opportunity for hearing". There is no statutory or regulatory provision requiring the Department to provide an opportunity for a hearing upon the denial of a variance under sec. Trans 233.11. Thus, one of the conditions for a hearing prescribed by § 227.51(1) does not exist. *See Metropolitan Greyhound Mgt. Corp v. Racing Board*, 157 Wis.2d 678, 694, 460 N.W.2d 802 (Ct. App. 1990).

Secondly, the legislature has provided for a specific statutory method of review of the denial of a variance in the form of a certiorari action as prescribed by Wis. Stat. §§ 236.13(5) and 62.23(7)(e)10. "[W]hen the legislature has provided that a specific agency proceeding is subject to a statutory method of review, that method of review is exclusive if it permits an adequate resolution of the issues raised." *Cox v. DHSS*, 185 Wis.2d 309, 316, 517 N.W.2d 526 (Ct. App. 1994).

The City has not yet formally submitted a plat for review under the procedures specified in Wis. Stat. Chapter 236 and Wis. Adm. Code Chapter Trans 233. The City has sought only the variance that is required by section Trans 233.05(1) before the Department can approve a plat that does not meet the standards of chapter Trans 233. To complete the plat review process under Chapter Trans 233 and Wis. Stat. Chapter 236, the City must obtain a variance *and* submit a plat for review so the Department may formally act upon the plat. If the Department disapproves the formally submitted plat, as it has indicated it would do, then the City would then have the right to appeal the disapproval by certiorari under Wis. Stat. § 236.13(5). The denial of the variance would then be subject to review in that certiorari action, as being part and parcel of the formal disapproval of the plat.

A certiorari action for review of the Department's disapproval of a plat thus would provide an adequate resolution of the issues raised. Accordingly, the contested case procedures of Wis. Stat. Chapter 227 do not provide for an alternative means of appeal. *Cox v. DHSS*, supra.

Finally, the Division of Hearings and Appeals is not bestowed with authority to conduct a hearing by virtue of the Department's written notice to the City in which it mistakenly notified the City it could request a hearing. Parties can not confer jurisdiction upon a tribunal by estoppel, waiver, or consent. *Kennedy v. DHSS*, 199 Wis.2d 442, 449, 544 N.W.2d 917 (Ct. App. 1996).

ORDER

IT IS HEREBY ORDERED, that the request of the City of Kaukauna for a hearing on the Department of Transportation's denial of a request for a variance under Wis. Adm. Code § Trans 233.11 is dismissed.

Dated at Milwaukee, Wisconsin, this ____ day of August 2000.

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By

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